that the Story case ignored this distinction and the resulting anomalies in the law of New York have already been pointed out in 2 COLUMBIA LAW REVIEW 158.

Broadly speaking, a nuisance interferes with the use and enjoyment of property, while to take property one must have the act of physical prehension *Edwards* v. *Boston* (1871) 108 Mass. 535 or, what falls perhaps a little short of this, the complete deprivation of the use of property *Pumpelly* v. *Green Bay Co.* (1871) 13 Wall. 166.

PURGING OF CONTEMPTS BY OATH.—The recent case *in re Shachter* (D. C., N. D. Ga. 1902) 119 Fed. 1010, decides that the mere oath of a bankrupt that he has turned over all his property to the receiver in bankruptcy, is not sufficient to purge his contempt, where the facts before the court show clearly that he has had property in his possession, which he has failed to account for.

The decision is in accord with the weight of authority in this class of cases. *In re Salkey* (C. C., Ill., 1875) 21 Fed. Cas. 239; *in re Purvine* (C. C. A., Tex. 1899) 96 Fed. 192; *in re McCormick* (D. C., S. D. N. Y. 1899) 97 Fed. 566; *in re Schlesinger* (C. C. A., N. Y. 1900) 102 Fed. 117, but it calls for an examination into and explanation of the question of purging of contempts by oath. The rule, as generally stated is, that in law the contempt is purged by oath, but that in equity it is not. 3 COLUMBIA LAW REVIEW 45; *King* v. *Vaughan* (1780) 2 Doug. R. 516; *Burke* v. *State* (1874) 47 Ind. 528. In discussing contempts, it is necessary, as pointed out in 3 COLUMBIA LAW REVIEW, *supra*, to distinguish clearly between those which are criminal and those which are civil. It must be true that in courts of law the criminal contempt alone was known originally, for those courts could not act *in personam* in the civil action brought to enforce a suitor's rights. The civil contempt, therefore, with its process of attachment, distinguished from the criminal contempt, in that it was brought to enforce the suitor's rights, had its origin in some other tribunal, though there is doubt as to its exact source. The most satisfactory explanation and the one most consistent with the development of the contempt, is that it came from the civil law through the Ecclesiastical Courts and the Chancery. Langdell's Summary of Equity Pleading, p. 30. But whether this is so or not, the distinction, above pointed out, namely, that the imprisonment for the civil contempt is to secure the suitor his rights, while that for the criminal contempt is to vindicate the dignity of the court, has always existed and still exists, although the process to-day is the same in both cases. Criminal contempts, therefore, being a mild form of treason, originally against the king, and later disrespect of or disobedience to the king's judges, were really crimes and punishable as such. The contemnor, however, by the process, borrowed from the civil law, as above suggested, was put to his oath to answer certain interrogatories, when the contempt was "constructive," that is not in the presence of the court. As to this form of proceeding, Blackstone says, 4 Black. Comm. 287, 288: "It cannot have escaped the attention of the reader that this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance, and seems, indeed, to have been derived to the

courts of King's Bench and Common Pleas through the medium of Courts of Equity." It necessarily followed, therefore, that to go behind this oath during the same investigation, was, in effect, to try the contemnor for perjury, without the jury to which he was entitled. Of course if foresworn, he could subsequently be prosecuted for the perjury, but "when indicted he would have bail, a trial in due form of law; if convicted, the right of appeal, and to apply for a pardon; but by convicting him under the form of the contempt proceeding, he is deprived of all these constitutional safeguards." SHELBY, Circ. J., dissenting *in re Purvine* (C. C. A., Tex. 1899) 96 Fed. 192, 199. See also, 2 Hawkins P. C. (6th ed) c. 22; *Rex* v. *Sims* (1701) 12 Mod. 511; *U. S.* v. *Dodge* (1814) 2 Gall. (U. S.) 313; *State* v. *Earl* (1872) 41 Ind. 464; *People* v. *Few* (1807) 2 Johns. (N. Y.) 290; *in re Walker* (1880) 82 N. C. 95.

In examining civil contempts the situation is found to be different. It is true, the process is the same, but here the offense is in reality not criminal. A suitor may be deprived of his rights, which have been already determined by the court and its decree given. To allow the contemnor to purge himself by his oath, might, it is true, subject him to a prosecution for perjury subsequently, if foresworn, at the instance of the King or the state, as in the criminal case, but this would not give the suitor those rights which are the object of his petition. It followed, therefore, that in equity, or rather in the civil contempt proceeding, the oath did not purge where it was evident to the court that the contemnor was able to obey. 4 Black. Comm. 288; *Underwood's Case* (1840) 2 Humph. (Tenn.) 46; *Magennis* v. *Parkhurst* (1844) 4 N. J. Eq. 433; *State* v. *Matthews* (1859) 37 N. H. 450; *in re Yates* (1809) 4 Johns. (N. Y) 317; *Smith* v. *Smith* (1862) 14 Abb. Pr. 130; *Crook* v. *People* (1855) 16 Ill. 534; *in re Pitman* (1852) 1 Curtis (U. S.) 186; *Rogers* v. *Patterson* (1834) 4 Paige Ch. 450.

In the principal case the contempt was clearly civil and the decision therefore correct. It is true that some of the Federal courts have expressed doubt as to the use of the contempt process as a civil remedy in those tribunals, owing to Rev. Stat. § 725, but, as suggested in 3 COLUMBIA LAW REVIEW, 45, the better view seems to be that of *Hendryx* v. *Fitzpatrick* (C. C., Mass. 1884) 19 Fed. 810 which holds that it can be so used where it is to secure private rights. As suggested in *in re Salkey*, *supra:* "the district court, as a court in bankruptcy, is clothed with all the powers of a court of equity"; and again, when discussing whether the oath of the bankrupt should purge in these cases, DRUMMOND, J., in the same case, on appeal, says: "A subsequent criminal prosecution for perjury does not pay the claims of creditors." See also the concurring opinion of SANBORN, J., in *Boyd* v. *Glucklich* (C. C. A., Iowa 1902) 116 Fed. 131, to the same effect. Another objection has been raised to this proceeding in these bankruptcy cases, namely, that after oath, an imprisonment of the bankrupt amounts to an imprisonment for debt. See dissent *in re Purvine* (C. C. A., Tex. 1899) 96 Fed. 192. But this is answered by the fact that if the bankrupt can show his oath to be true, he is, of course, purged, Rapalje, Contempt § 115. In *Mueller* v. *Nugent* (1902) 184 U. S. 1, it is said, "The order to pay over the money was not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt placed in *custodia*

legis by the adjudication." See also *in re Schlesinger, supra*; *in re Rosser* (C. C. A., Mo. 1900) 101 Fed. 562.

RESTRAINING PROSECUTION OF ACTION BROUGHT IN ANOTHER STATE. —Will the courts of one State, having jurisdiction over the person of a defendant, enjoin him from bringing or prosecuting an action in another State? Generally speaking they will, when, by so doing, more complete justice can be done between the parties. In *Locomobile Co. of America* v. *American Bridge Company of New York* (1903) 80 N. Y. Sup. 288, such an injunction was granted, the Court being convinced, in view of the circumstances of the case, that better justice could be done in New York than in Connecticut.

The question is at best one of policy. For, having once obtained jurisdiction, a court of equity can, by acting *in personam*, prohibit the inequitable acts of either party. But the propriety of exercising this power, when its exercise indirectly interferes with the courts of independent States, has been the cause of much difference of opinion.

In England both the power and the propriety were formerly doubted. In *Lowe* v. *Baker* (1692) 2 Freem. 125 Lord CLARENDON refused to grant the injunction on the ground that the court had no authority to bind a foreign court. The reporter, however, throws doubt on his conclusion by adding "Sed quære, for all the bar was of another opinion?" This doubt was finally dispelled by Lord BROUGHAM in *Portarlington* v. *Soulby* (1834) 3 Myl. & K. 104, in which he reviews the whole subject, points out that the court is only commanding the obedience of the defendant, and declares that the power should be exercised whenever justice demands it.

In the United States the subject assumes several aspects. On the one hand there is danger of conflict between the courts of different States, and on the other of conflict between State and Federal courts. And in each of these there arise two questions: 1st. Is such an interference in accord with the spirit of comity that should exist? 2d. Does such an injunction contravene the full faith and credit clause of the Federal Constitution, (Const. Art. IV. Sec. 1)?

Considering these in the order named, we find in early times a strong tendency on the part of the courts of one State to refuse to interfere, even in this indirect manner, with the courts of other St ates. *Boyd* v. *Hawkins* (N. Car. 1833) 2 Dev. Eq. 229. New York probably the strongest exponent of the doctrine and *Mead* v. *Merritt* (1831) 2 Paige 402 is cited by all its advocates. In that case Chancellor WALWORTH says "I am not aware that any court of equity in the Union has deliberately decided that it will exercise the power, by process of injunction, of restraining proceedings which have been previously commenced in the courts of another State." This case was followed in *Williams* v. *Ayrault* (1860) 31 Barb. 364, and *Harris et al* v. *Pullman et al.* (1876) 84 Ill. 20, and was interpreted as laying down an iron-bound rule of policy. But this interpretation may be doubted in the light of another case decided also by Chancellor WALWORTH, *Burgess* v. *Smith* (1847) 2 Barb. Ch. 276, and of a long line of cases in New York and elsewhere, in which the courts refuse to be bound in this absolute manner.

In *Vail* v. *Knapp* (1867) 49 Barb. 299, the court say "While as a general rule, the propriety of which is apparent, the courts of this